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Office of Administrative Law Judges
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DATE ISSUED: November 15, 2000

CASE NO.: 2000-LHC-300

OWCP NO.: 08-111808

IN THE MATTER OF

LARRY J. HODGE
Claimant

v.

TEXAS DRYDOCK
Employer

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.
Carrier

APPEARANCES:

Quentin D. Price, Esq.
Ed W. Barton, Esq.
For Claimant

Michael D. Murphy, Esq.
For Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Larry J. Hodge (Claimant) against Texas Drydock (Employer) and Signal Mutual Indemnity Association, Ltd. (Carrier). The formal hearing was conducted at Beaumont, Texas on July 19, 2000. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence Joint Exhibit 1, Claimant's Exhibits 1-11 and Employer's Exhibits 1- 27.[2] This decision is based on the entire record.[3]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of the injury/accident was September 26, 1996;

2. The injury occurred in the course and scope of employment;

3. An Employer/Employee relationship existed at the time of the accident;

4. The Employer was advised of injury on September 26, 1996;

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[1]The parties were granted time post hearing to file briefs. This time was extended up to and through October 23, 2000.

[2] Employer's Exhibit 28 and Claimant's Exhibit 13 were submitted post hearing.

[3] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __, lines __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

5. A Notice of Controversion was filed on February 5, 1997;

6. An informal conference was held on April 17, 1997 and February 26, 1998;

7. Some benefits were paid from September 26, 1996 to October 20, 1996 in the amount of 3-4/7 weeks at $208.12 per week, for a total paid of $743. 28; and

8. Some medical benefits were paid, but Dr. Tuft's treatment and treatment by a psychologist was denied.

Unresolved Issues

The unresolved issues in this case are:

1. Nature and extent of disability;

2. Average weekly wage and compensation rate;

3. Section 7 medical benefits; and

4. Attorney's fees, penalties and interest.

Statement of the Evidence

Testimonial and Non Medical Evidence

Claimant is 48 years of age and lives in Bridge City. He has a high school diploma. He has never taken any college courses, been certified with regards to a particular skill, or engaged in vocational training after his accident. After high school, Claimant performed various jobs. He was a farmer, machinist, electroplater, made and processed TV set tubes, and engaged in boilermaking and shipfitting. In the last ten years, Claimant testified that he has consistently worked except he was once off work for more than a year, during which time he raised his three children and received unemployment compensation.

According to Claimant he was in perfect health prior to the September 26, 1996 accident. Claimant testified that he had taken time off because of work related injuries when he was employed by Morris Chain, Gear and Sprocket Co. and Sylvania. Prior to the accident, Claimant did not have a family physician and had only gone to the hospital for a sprained knee and sprained ankle.

Claimant testified that on the day of the accident, September 16, 1996, he was employed by Texas Drydock Incorporated (TDI), working on Pleasure Island, as a shipfitter.[4] At the time of the accident, Claimant was earning about $11 per hour. According to Claimant, a shipfitter's job was to cut, replace, and tack heavy gauge steel, which was used in the structural fittings for decks and platforms. The cutting performed was either electrical or gas. When Claimant was hired by TDI in June 1996, he was expected to work seven days a week, for ten hours per day. Claimant said he actually worked ten hours per day a few days during the week each week while employed at TDI. Claimant testified that today he could not work as a shipfitter.

On the day of the accident, Claimant was physically inside the leg of an offshore floating drilling rig. On that day, Claimant testified that he was in the process of cutting the deck to install a chain locker pipe. He went up underneath in the enclosed space to finish cutting the beams holding up the deck. As Claimant was cutting the beam the room "engulfed in smoke",he tasted fumes in his mouth and became lightheaded. After Claimant made it out of the confined work space and onto the top of the rig, he started gagging and dry heaving. Claimant testified that others remarked he turned white. He said he was on his knees gasping for air.

The accident happened about two to four hours before his shift was over. According to Claimant, his foreman, Tom Conway, suggested Claimant stay on top of the rig in the fresh air for the remainder of his shift because he was so sick. Claimant said his breathing apparatus was not functioning properly. He explained that because the apparatus was so difficult to remove, he just continued cutting the beam since he was so close to finishing.

Claimant testified that no blower, ventilation device, or air sock was installed

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[4]EX 19 is Claimant's employment application for TDI, on which he applied for the position of shipfitter.

prior to beginning work in the confined space. Claimant's "hole watch" and partner, another fitter, was on the deck monitoring his work, ready for an emergency. This "hole watch" was a safety man, watching for fires, falling debris, etc., that might endanger the worker in the confined space.

Claimant testified that he had cut through old metal covered with several coats of paint. According to Claimant, each time the room was painted, both sides of the beam were coated with paint. Claimant observed the date 1969 on the tanks located in the area where he cut the beam. He assumed the beam he was cutting had been in the rig since it was originally built, because that particular beam was the main structure beam.

Claimant testified that he had been exposed to smoke and fumes at TDI prior to the September 26, 1996. According to Claimant, he was cutting metal, wearing a paper dust mask provided by Employer, when he had an accident similar to the one of September 1996 and experienced similar symptoms. He had the same partner working with him then, as he did in September 1996. During this earlier incident, his partner experienced the same symptoms because he worked alongside Claimant. Claimant testified that he was unaware of any long-lasting problems from the first accident.

Claimant went to the emergency room of St. Mary's Hospital in Port Arthur two days after the September 26, 1996 incident. According to Claimant, he was treated at the hospital and then discharged. Upon discharge from the hospital, Claimant was told to return the following Tuesday, October 1, 1996, as an outpatient. Claimant testified that he did not go to another doctor or medical facility between September 28, 1996 and October 1, 1996.

Claimant testified that when he returned for the outpatient visit on October 1, 1996, he was immediately admitted by his doctor, Dr. Sukhavasi. Claimant had various tests performed during the three and one-half days hospital stay. According to Claimant, Dr. Sukhavasi explained that he had probably been poisoned and should be examined by a toxicologist. Claimant testified that Dr. Sukhavasi told him Mr. Thweatt was going to arrange the toxicology appointment.[5]

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[5]Mr. Thweatt was the claims adjuster assigned to Claimant's case on behalf of Employer/Carrier.

Claimant stated that he was uncertain as to when he began talking to Mr. Thweatt via the telephone, but he believed it was while he was in the hospital.

Claimant testified that Dr. Sukhavasi kept him out of work for about two weeks after he was discharged from the hospital. During that two week period, Claimant went to Dr. Sukhavasi's office for appointments. Claimant returned to work at TDI on October 21, 1996. Upon returning to work, Claimant's first few days went well. However, shortly thereafter on October 30, 1996, when moving equipment for a new job, Claimant slipped on a loose scaffold board and almost fell 80 feet. As a result of this "near" fall, Claimant testified that his body shook, quivered and then locked up. He stated that he began crying and believed he was having a stroke. He was taken to the St. Mary's Hospital, but in two hours he walked out perfectly fine.

Within one week of the October 30, 1996 incident, Claimant returned to work at TDI. According to Claimant, he was unable to do his job, so he talked to his foreman who referred him to the main office. At the main office Claimant asked about alternative assignments until he could return to his normal job. According to Claimant, a man in the main office told him if he could not perform the duties for which he was hired, he should quit. Therefore, Claimant, in early November 1996, quit his job at TDI and went home.

Claimant testified that after he quit his employment at TDI, he was uncertain as to the status of the toxicologist examination. Claimant believed that Employer was scheduling the toxicologist appointment. As regards the status of the appointment, Claimant testified that he talked to Mr. Thweatt and Dr. Sukhavasi. According to Claimant, Mr. Thweatt told him he was having a problem scheduling a toxicologist appointment for a number of reasons. Claimant testified that no one from TDI or Dr. Sukhavasi's office told him he had an appointment scheduled with a toxicologist. As a result of these delays, Claimant hired his attorney.

On March 16, 1997 Claimant went to work for Trinity Marine Products (Trinity). The time between November 1996 and March 1997, Claimant stayed at home. Claimant said during that time period, his symptomatology included constant sleeping, migraine headaches, head swelling, and chest pains. Claimant testified that also his body "was like prickly going to sleep off and on on its own." (Tr. 62, lines 5) Claimant told his symptoms to Dr. Sukhavasi and Mr. Thweatt,

and they assured him something would be done about it.

When Claimant was hired by Trinity in March 1997, he worked as a shipfitter. Claimant's work there was similar to the work he performed while employed at TDI. He cut and fit pipe. Employer's Exhibit 25, Trinity's wage records, indicated that Claimant worked 72 to 90 hours a week as a shipfitter. Claimant testified that he quit Trinity in June 1997, because the work environment was unsafe and the fumes bothered him. Claimant testified that while employed at Trinity he continued to have anxiety attacks. Claimant was asked on cross examination about Employer's Exhibit 25, page 17, which stated that Claimant was fired from Trinity because of a violation of a substance abuse. Claimant denied any knowledge of this allegation.

Claimant was asked on cross examination about the informal conference he attended with his lawyer in April 1997. Claimant was unable to remember why medical treatment and not compensation was an issue. After the informal conference, Claimant went to see Dr. Sukhavasi again in May 1997. Claimant testified that he disagreed with Dr. Sukhavasi's report which stated that his pulmonary test findings were normal, because, according to Claimant, he continually had difficult breathing, which was related to his lungs.

In June of 1997, Claimant began working at Texas Industrial Contractors as a contract laborer. He worked as a box boy, forklift driver and then a bale inspector. Claimant testified that when working as a box boy, the glue and heat from assembling boxes constantly made him sick and made it difficult for him to perform his duties. He was then given the assignment of forklift-truck driver. Claimant testified that he operated a propane forklift which released fumes and gasses that made him sick enough to affect his job performance. Claimant transferred to the job of bale inspector. Claimant said that he had problems with this assignment also. According to Claimant, he inhaled fumes emitted from the electric cutting machine that cut material similar to Saran Wrap, used to wrap the bales.

As a contract laborer for Texas Industrial Contractors, he was contracted to work at the Bayer facility in August 1997. In August, as he was working, he was overcome by heat. Claimant testified that he got sick, vomited, dry heaved, cried and experienced chest pain and shortness of breath. Claimant said his supervisor calmed him down and sent him home. Claimant drove himself home, but someone

else took him to Baptist Hospital. He was sent home a few hours later.

Claimant testified that he had another anxiety attack in August 1997 when his daughter ran away. While he worked at the Bayer facility he was always sick. He testified that he tasted and smelled the fumes, but that he continued to work at Texas Industrial Contractors until late December 1997. Claimant said he had not worked anywhere since December 1997.

Claimant testified that he injured his back sometime after December 1997. He explained that when he was taking a shower, he sneezed, and experienced a shooting pain in his back. He went to Baptist Hospital and the University of Texas Medical Branch (UTMB). According to Claimant, the staff at UTMB explained that he needed a back operation for a herniated slipped disk. Claimant has not had surgery.

In October 1997, Claimant was examined by Dr. Tuft, an allergist. Dr. Tuft performed various tests on Claimant, including lung tests and skin tests. During his visit with Dr. Tuft, Claimant had a breakdown and Dr. Tuft discussed possible psychological treatment. According to Claimant, Dr. Tuft said Claimant's problems sounded similar to when soldiers went to Viet Nam and got "shell-shocked", and that Claimant suffered from possible depression. Claimant could not remember whether or not Dr. Tuft recommended he see a psychologist or psychiatrist. Claimant was unable to provide an answer during cross examination as to why Dr. Tuft never mentioned the diagnosis he explained to Claimant, and why Dr. Tuft's only diagnosis was allergies to Russian thistle and mold.

Claimant testified that Dr. Tuft treated his sinuses with various medicated sinus sprays. He testified that Mr. Thweatt approved his prescription for the medicine. Claimant received the first order of medication, but when he went to refill the order, the insurance company did not approve it, so he never received the medication. Claimant believed he would benefit from continued treatment.

Claimant was also examined by Drs. Wills, Perez, and Holland. Claimant was sent to Dr. Perez, a psychologist, at the request of Employer. When Claimant went to Dr. Perez's office, he complained of a chemical smell in the waiting area and stepped outside of that area. According to Claimant, Dr. Perez told Claimant he had to come back into the office, "or else." Claimant and his girlfriend

accompanied Dr. Perez into his office area. When he got inside of the office Claimant began to shake, cry, his face swelled and he could not catch his breath. Claimant had a spasm on the floor, during which Dr. Perez continued to question him. Claimant testified that his girlfriend answered the questions for him. Claimant stated that Dr. Perez made no arrangement for him to be seen again, nor did he move Claimant to another room without the strong smell. According to Claimant, he was wheeled out of Dr. Perez's office in a wheelchair. Claimant testified that he never talked to Dr. Perez again, but that to his understanding Dr. Perez opined Claimant was "faking." On cross examination, Claimant admitted that during his initial introduction to Dr. Perez, he was lying down on the ground in front of the office door, spitting up.

Claimant next was examined by Dr. Vanessa Holland. He had tests performed in the office, but Dr. Holland never came in to talk with him about them. Claimant never talked to Dr. Holland again and does not know what was in her report. However, during cross examination Claimant testified that he agreed with her report.

Claimant was examined by Dr. Wills twice. Claimant testified that when he first saw Dr. Wills, various tests were performed. The following day, Claimant returned to Dr. Will's office and discussed the results of the tests. According to Claimant, Dr. Wills explained Claimant's problem to be depression.

Claimant was asked how he felt during his trial testimony. Claimant testified that he felt "lousy." According to Claimant, he had problems talking and understanding. Claimant testified that his symptomatology included sleep, weight, and back problems.

Claimant testified that with regard to the video tape offered by the Employer, he does not recognize any person or vehicles on the edited version of the tape. According to Claimant, he does not know Jefferson Adams, nor is he familiar with a certain address in Orange, Texas. Claimant said he was not one of the two people in the videotape. According to Claimant, he has never operated a weed-eater or lawn mower at someone else's house, other than his own, since the accident.

Claimant has changed the oil in his car and tried carpentry since the

September 1996 accident at TDI. Claimant collected unemployment benefits from November 1996 through February 1997, after his employment with TDI, until his employment with Trinity Marine. Claimant testified that prior to the September 1996 accident at TDI, he had previously collected unemployment benefits. Claimant agreed that in order to collect compensation benefits he had to represent himself as ready, willing and able to work, and had to check in with Texas Workforce Commission to confirm he had been actively looking for work. With regards to the compensation paid from November 1996 to February 1997, Claimant represented to the Texas Workforce Commission that he was willing to try to work, and he in fact looked for various jobs.

Claimant was questioned about Employer Exhibit 27, records from Texas Industrial Contractors. Claimant confirmed that he was hired on a probation period before being hired permanently on June 18, 1997. On August 20, 1997, Claimant was reprimanded for violating a safety requirement. Claimant did not work the following two days, and was unable to remember the reason why.

Claimant was unable to comment about Claimant's Exhibit 8, his social security earnings in 1998 while employed for Texas Industrial Maintenance. Claimant testified that he filed a claim for Social Security Disability benefits which was denied. Claimant was unable to remember whether or not in that claim he said he could not work due to bad vision.

Employer's Exhibit 28 is the deposition of Ronald Thweatt, taken post hearing on August 9, 2000. Mr. Thweatt was the claims adjuster assigned to Claimant's case, on behalf of the Employer and Carrier. He talked to Claimant twice by telephone and visited with Claimant in October 1996. Claimant filed his LS-203 form in February 1997. Mr. Thweatt said he had no contact with Claimant between when he visited Claimant in October and when Claimant filed his form in February. Mr. Thweatt explained that he knew this to be true because he reviewed his file and handwritten time sheet entries. The reason why he did not take steps to procure medical treatment for Claimant during October 1996 through February 1997, was because Claimant did not ask him to do so. He stated that he never represented to Claimant he would go out and get him medical treatment at any time.

Mr. Thweatt explained that based on his meeting with Claimant, and after reviewing the medical records, in October 1996 he treated Claimant's case as a

"routine metal fume fever or paint fume fever case." (pg. 9) He explained that many shipyard workers who perform welding, burning, etc., are exposed occasionally to a condition termed metal fume fever or paint fume fever. Most long time workers recognize the symptoms of this condition and self treat themselves by drinking milk and taking antacids. Most recover in 24 hours, usually a maximum recovery is 48 hours, 72 hours at the most. Mr. Thweatt has handled dozen of cases like these.

Mr. Thweatt described his visit with Claimant at Claimant's home on October 18, 1996. He stated that he smelled tobacco smoke inside of the trailer, and that he was familiar with such a smell. When Mr. Thweatt visited Claimant he obtained Claimant's signed medical authorization. He testified that he probably told Claimant if he needed additional medical care or to change physicians, he was to call him, as this was his standard procedure. However, he could not remember specifically telling Claimant. Mr. Thweatt referred to the written statement of Claimant taken during his visit[6]. When asked about his health, Claimant stated that his symptoms included headache, shortness of breath, and sinus problems. When asked about returning to work, Claimant replied that he expected to return that upcoming Monday, as Dr. Sukhavasi had released him to return to work on such date.

Mr. Thweatt talked about the informal conference he attended on behalf of Employer/Carrier on April 17, 1997. He stated that the only issue was medical and no claim was made for permanent disability benefits. After the informal conference, an agreement was reached to have Dr. Sukhavasi re-examine Claimant. Mr. Thweatt said that in Dr. Sukhavasi's May 1997 report, the doctor found no worsening of Claimant's condition.

The Department of Labor referred Claimant to Dr. Tuft, an allergist. Mr. Thweatt explained that he did not authorize the treatment suggested by Dr. Tuft for sinusitis because Dr. Tuft's report did not make clear the connection between the September 1996 accident and Claimant's injury. According to Mr. Thweatt, Dr. Tuft stated that Claimant's injury may have been caused by the September accident, or it may have been caused by a dust allergy. He, therefore, regarded Dr. Tuft's report as insufficient to connect Claimant's injury to the accident. Mr.

[6]The statement is found in Claimant's Exhibit 13, after Dr. Wills' deposition.

Thweatt also stated that Dr. Tuft's sinusitis diagnosis in May 1997 was different from his earlier diagnosis of chemical inhalation.

Mr. Thweatt could not recall ever talking with any physician involved in the case. However, on cross examination, after reviewing his records, it appeared that Mr. Thweatt, from the time period of October 1996 through January 1997, tried to contact Dr. Sukhavasi and his office to discuss Claimant's condition. Apparently, after his visit with Claimant on October 18, 1996, Mr. Thweatt went to Dr. Sukhavasi's office to inquire about Claimant's medical status and reports. Also apparent from Mr. Thweatt's records, was that after visiting Dr. Sukhavasi's office, Claimant telephoned Mr. Thweatt to inquire about his meeting with Dr. Sukhavasi, and Mr. Thweatt advised Claimant that he was waiting for his record. Claimant apparently made a second phone call that day to Mr. Thweatt inquiring about his medical record. As a result of Claimant's second telephone call, Mr. Thweatt called Dr. Sukhavasi's office again. He then returned Claimant's phone call and explained that Claimant needed to standby and he would get in touch with him when he had the information. Later that same day, Mr. Thweatt called Claimant again regarding indemnity payments.

As regards Mr. Thweatt's time sheet of November 14, 1996, he noted that he had received and reviewed a report from Dr. Sukhavasi.[7] On November 25, Mr. Thweatt "received, reviewed, okayed two bills from Dr. Sukhavasi, and requested records from St. Mary's Hospital to cover two bills received from them today." (pg. 36) Mr. Thweatt was unable to explain the secretarial notation[8] on his December 4 time sheet, which stated "provide claimant info for med report." (Id.) On December 26, Mr. Thweatt received and reviewed the records from St. Mary's Hospital. There was another secretarial notation on his January 2, 1997 time sheet, which said to update transmittal of medical records to Signal.[9] There is no indication in any of these notes or time sheets that the medical reports and records

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[7]Mr. Thweatt's time sheet are included at the end of Employer's Exhibit 28, marked as "Exhibit 1."

[8]Apparently on the original, the secretarial notations were in green ink, and Mr. Thweatt's notations had the initials "T.R." next to the entry. The photocopies in evidence do not show such a distinction.

[9]Signal Mutual Indemnity Association, Limited. Signal is the compensation carrier in this case.

obtained from Dr. Sukhavasi were sent to Claimant. According to Mr. Thweatt, his office does not routinely send that information to the claimant.

Mr. Thweatt was asked to assume that Dr. Sukhavasi recommended Claimant see a toxicologist or family physician. Mr. Thweatt did not authorize either, because no one ever approached him for an authorization. According to Mr. Thweatt, no notation was made on the medical report that a copy was sent to Claimant. Mr. Thweatt was asked about the procedure he employed about scheduling further medical treatment when a patient never received a copy of the doctor's report recommending such treatment. According to Mr. Thweatt, in his experience, the doctor's office contacted the patient and made the referral to whomever the patient selected. If an authorization was needed for the referral, the doctor's office would call Mr. Thweatt for approval.

Mr. Thweatt stated that he was certain the doctor's office would have called him about referring Claimant to a toxicologist, but he has no record of this call. Mr. Thweatt said that he did not understand that Claimant requested authorization to be examined by a toxicologist. He stated that he remembered that Claimant had withdrawn the request for a toxicologist, and had suggested that an allergist might be more appropriate.[10]

Mr. Thweatt's February 5, 1997 time sheet stated that he had received Claimant's claim for compensation. To the best of his knowledge, Claimant had returned to work at Texas Drydock the Monday after he had last spoken to him in October 1996.

Employer's Exhibit 23 is the written transcript of the telephone conference between Ron Thweatt and Claimant, taken on October 2, 1996. They discussed Claimant's hospitalization and various test that were performed. Claimant's symptomatology included headaches, shortness of breath, dizziness, chest pains, weakness, and sleeping disorders. Claimant discussed the September 26, 1996 accident and his resulting symptoms which began the day after the accident.

Employer's Exhibit 24 is the written transcript of the telephone conference

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[10]*See* Employer's Exhibit 17, a letter from Claimant's attorney following up a conference he had with Ms. Kluskey at the O.W.C.P.

between Ron Thweatt and Claimant, taken on October 10, 1996. According to Claimant, all of his hospital tests were normal and he was released on October 4, 1996. He discussed how he was admitted to the hospital, his symptoms, and his reaction to the medication. Mr. Thweatt stated that no one from the hospital had called him for authorization of treatment. Claimant had no explanation. Mr. Thweatt explained that when he visited Claimant at the hospital the morning he was discharged, he tried to get Claimant's hospital records but was unable to find hospital staff to assist him. He said that he would try and contact the hospital again to get Claimant's records and diagnosis. Claimant stated his treating doctor was Dr. Sukhavasi and he could not go back to work without a doctor's excuse. According to Claimant, Dr. Sukhavasi explained he was allergic to smoke and that he had another doctor's appointment in 2 weeks.

Employer's Exhibit 11 is a surveillance video. The video depicts, on April 1, 1998 from 10:59 am to 12:20 pm, two men at a gas station. The man whom the surveillance appears to be focused on got into the passenger side of a truck and the truck drove off. The video depicts this same man using a "weed wacker" outside of a house. This man also appeared to start a hand powered lawnmower. The video ended with that man sitting on the tailgate of the truck.

Employer's Exhibit 12 is the surveillance report written by Jon Conley, who is employed by The Eyes of Texas, Investigations. Apparently, Mr. Conley performed the surveillance depicted by the video. His written report detailed the "subject's" activities.

Employer's Exhibit 18 are Claimant's answers to interrogatories, dated April 27, 2000. At the time of the September 1996 accident, Claimant had been employed by Texas Drydock, Inc. for about 4 months, and was paid $10.50 per hour. Claimant described his symptoms, listed his medications and described when and why he saw doctors before and after his September 1996 accident. After the September accident, Claimant was employed by TDI for 2 weeks in October, Trinity Marine Products from March 10, 1997 through April 13, 1997, and Texas Industrial Maintenance from June 14, 1997 through August 23, 1997[11] Claimant

[11]Claimant was mistaken. The evidence shows that Claimant was employed at Texas Industrial Maintenance in 1998, not 1997. He worked at Texas Industrial Contractors from June 13, 1997 through December 31, 1997. The evidence also shows Claimant had been employed by Newtron as a

contends he has not reached maximum medical improvement because he still has sinus problems, upset stomach, breathing problems and headaches. In response to the question concerning Claimant's average weekly wage, Claimant contends his average weekly wage was at least $312.17.

Employer's Exhibit 21 is the employment/payroll record of R. N. Pyle Contractors, Inc. Apparently, Claimant was employed at R. N. Pyle Contractors from October 24, 1995 through October 31, 1995. According to his W-2 form, his wages were $775.98. (EX 22)

Employer's Exhibit 26 is the employment/payroll records from CBH Services. Claimant was employed at CBH February 22, 1996 until May 1. 1996. His net take home pay for that period was $8880.38.

Employer's Exhibit 13 is Claimant's earning records from Employer, Texas Drydock, Inc. From June 23, 1996 until October 31, 1996, Claimant's total dollars earned were $8577.38.

Employer's Exhibit 25 is the enrollment/payroll records from Trinity Marine Products. Claimant worked at Trinity from March 10, 1997 until April 9, 1997 when he was discharged for violation of a substance abuse. His net pay for that period was $2565.99.

Employer's Exhibit 27 is the enrollment/payroll records from Texas Industrial Contractors, Inc. He worked there from June 13, 1997 until December 31, 1997, when he quit. On August 20, 1997, Claimant was given a written warning that stated if he violated another safety rule, he would be terminated. Claimant's net pay was $8024.61.

Employer's Exhibit 6 is the employment/payroll records of Texas Industrial Maintenance. Claimant was employed at there from January 3, 1998 until February 9, 1998, when he quit. His net pay, after 6 checks was $1734.33.

Employer's Exhibit 22, 20 and Claimant's Exhibit 8 are the earnings records of Claimant. According to Claimant's 1995 W-2 forms, while employed at

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shipfitter in 1994 and 1995.

Newtron, he earned $176.88. While employed at C.A. Turner Construction Co., Claimant earned $1432.69. Claimant's 1996 W-2 form reported an earning of $502.23 while Claimant was employed by C.A. Turner Maintenance, and $8880.38 while working for CBH Services, Inc. CX 8 contains other 1996 W-2 forms, which stated that Claimant earned $8577.38 while employed by Texas Drydock, Inc. and $509.40 while employed by Newtron.[12]

Employer's Exhibit 9 and Claimant's Exhibit 9 are the annual wage records of 3 employees: Martin Figuero, Jimmy Broussard, and Chad Arabie. Apparently the 3 employees worked for Friede Goldman Offshore Texas, L.P. The records do not show which positions these men hold. The regular rate per hour ranged from $7.00 to $10.50. The annual salary for each of these men was $46, 229.74; $34, 781.47; and $30, 066.69.

Employer's Exhibit 7 is the affidavit of Mr. Gene Chambliss with attached wage records. Mr. Chambliss is the Human Resources manager of Freide Goldman Offshore Texas, L.P, the successor to Texas Drydock. Attached were the wage records of 3 employees: Rolando Chicas, Luis Trejo, and Jorge Sanchez. They were shipfitters during the 52 weeks prior to Claimant's September 1996 injury. Mr. Chambliss stated that the wage records of these 3 shipfitters were representative of the middle range of wages paid to shipfitters by Texas Drydock. The regular rate per hour ranged from $6.50 to $10.50. The total dollars earned by these 3 men were $10,171.94 over a period of 7 months; $10, 158.75 over a period of 5 months; and $9, 439.52 over a period of 6 months.

Claimant's Exhibit 11 is Claimant's supplemental answer to Employer/Carrier's interrogatories. Claimant's attorney calculated Claimant's average weekly wage and explained his basis for the calculation.

Claimant's Exhibit 8 and Employer's Exhibit 5 are social security administration records of Claimant. The statement of earnings spans from 1987 through 1989.

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[12]CX 8 also included copies of checks from Claimant's past employers, including R.N. Pyle Contractors. The evidence shows Claimant earned $10.50 per hour while employed by Texas Drydock.

Employer's Exhibit 14 are the records from the Texas Workforce Commission. Included are records of unemployment compensation. Claimant apparently completed in August 1996, a MOST (Mobilization Optimization Stabilization and Training) Hazard Recognition Safety Training Class. This class was for boilermakers, with the purpose of eliminating accidents. (p.32) Included was a signed form whereby Claimant stated that to remain eligible for compensation he would make "an active, independent search for work." (p. 33) The Texas Workforce Commission Tele-Serv. claim certification, dated November 3, 1996 through February 22, 1997, is a questionnaire whereby Claimant had stated he was able to work each day during the claim period and that he searched for full-time work during this time period.

Employer's Exhibit 8 is Monica Hebert's vocational rehabilitation report of June 23, 2000. Her report was based on her interview with Claimant and tests performed by Claimant. Ms. Hebert found 3 jobs that Claimant should be able to perform: sales clerk, cashier/checker, and small products assembler. The wage ranged from $5.15 to $8.00 per hour. Ms. Hebert, in her report, stated that Claimant's driver's license had been suspended because he was convicted of having a controlled substance, marijuana, in his car.

Employer's Exhibit 17 and Claimant's Exhibit 2 is correspondence of the attorneys, summation of telephone conferences and Claimant's longshore forms. Included is a Memorandum of a telephone conference, which occurred on April 17, 1997. The parties to the conference were Claimant, his attorney, and Ron Thweatt. The memo states that Claimant "needs medical treatment. Wants authorization to be treated by a toxicologist." (pg. 12) The Employer/Carrier's position was also included in the memo.

In a letter dated September 4, 1997, from Claimant's attorney to the Claims examiner, Miss Kluskey, Claimant's attorney stated, "I requested your assistance in locating a toxicologist to examine Claimant. However, you [Miss Kluskey] pointed out that a toxicologist would probably be a waste of time and money, and that an allergist might be more appropriate. As I explained to you, Claimant is certainly willing to see any appropriate medical specialist because he is continuing to suffer significant respiratory problems, especially when exposed to any fumes, dust, etc." (EX 17, pg. 11)

Medical Evidence

After Claimant was injured on September 26, 1996, he was examined at St. Mary's Hospital, and by Drs. Tuft, Wills, Perez and Holland. Claimant went to St. Mary's Hospital on September 28, 1996. His chief complaints were shortness of breath, body pain, and intermittent vomiting. (Employer's Exhibit 15) The findings on all of the tests performed on Claimant were normal and the diagnosis was acute bronchitis. (Id.)

Claimant returned to the St. Mary's Hospital's Emergency Room on October 1, 1996. Claimant's chief complaint was shortness of breath. (CX 7) Claimant related a history of the accident. The diagnosis was probable inhalation bronchitis or metal fume toxicity. Claimant was admitted to the hospital under the care of Dr. Sukhavasi.

Claimant was admitted to St. Mary's Hospital on October 1, 1996. Dr. Sukhavasi's report, entitled "History and Physical prior to Admission", detailed that Claimant was a 44 year old male who had come to the ER on September 28, 1996 with complaints of shortness of breath, and dizziness. (EX 16, CX 7) All tests run had normal findings. Claimant had been sent home but he did not get better. He returned to the hospital, with symptoms of shortness of breath, lightheadedness, and nonspecific body aches. Claimant denied any symptoms of cough, sputum production, vomiting, nausea, or abdominal pain. Dr. Sukhavasi's assessment/plan was to rule out intracranial pathology, continue breathing treatments, get pulmonary function test, ABG on room air, check for orthostasis and to check CT scan of head, cartoid Dopplers, and urine for toxic screening.

While Claimant was in the hospital, Dr. Agustin performed a consultation. (CX 7) Claimant's symptomatology included headaches, vomiting, dizziness, and weakness. Dr. Agustin's report included a description of the September 1996 incident and Claimant's resulting symptoms. The report noted that Claimant smoked cigars and his profession was a welder. Dr. Agustin's impression was that Claimant had post-exposure to toxic fumes. Claimant's neurological exam was normal. Dr. Agustin recommended symptomatic treatment and continuation of observation. All tests performed on Claimant had the result of normal.

Claimant was discharged from the hospital on October 4, 1996. (EX 15) All

of the tests performed on Claimant were normal. Dr. Sukhavasi advised Claimant to seek an opinion from a toxicologist or a family physician. Dr. Sukhavasi determined that Claimant reached maximum medical improvement on October 16, 1996 at a 0% whole body impairment rating. (CX 7) Dr. Sukhavasi released Claimant to return to regular work duties on October 21, 1996. (CX 7). No restrictions were issued. Dr. Sukhavasi's diagnosis was chemical inhalation.

Saint Mary's Hospital records also show that Claimant went to the emergency room on October 30, 1996. (CX 7) His chief complaint was tingling in his arms and that his legs locked up because he almost fell 100 feet while working. The handwritten note stated that Claimant appeared very anxious.

Dr. Sukhavasi wrote a letter dated May 19, 1997, addressed to "whom it may concern." (CX 7) Apparently, Dr. Sukhavasi examined Claimant on April 13, 1997 and May 9, 1997. Claimant's April examination was a follow up visit from his October 4, 1996 hospital discharge. During both examinations, Claimant complained of headache, nasal stiffness, shortness of breath, weakness, and constant tiredness. Dr. Sukhavasi's assessment was that Claimant was stable with regards to his pulmonary functions and it was possible for Claimant to have airway disease. Dr. Sukhavasi suggested Claimant see a toxicologist for further evaluation. He advised Claimant to see a primary physician for his other symptomatic problems.

Claimant's Exhibit 3 is the deposition of Dr. Daniel S. Tuft, taken on June 16, 2000. Dr. Tuft is certified by the American Board of Allergy and Immunology. Dr. Tuft summarized his educational background and work experience. His specialty is one of allergist. Dr. Tuft is currently employed by Southwest Asthma and Allergy Associates.

Dr. Tuft examined and treated Claimant on two occasions, October 9, 1997 for an allergy evaluation, and October 20, 1997 for a follow up appointment. On the first visit, Dr. Tuft prescribed medication for Claimant which included several nose sprays, and ordered a CAT scan of his sinuses and a methacholine challenge. During Claimant's first examination by Dr. Tuft, Claimant stated that he had inhaled fumes while working in an enclosed space. According to Claimant, he wore the wrong type of respirator and after leaving the enclosed area he collapsed, vomited, felt weak, had tremors and loss of memory. Claimant also stated that he had a

similar episode a week prior. Claimant explained that he went to the hospital 3 days post accident, was seen in the emergency room, and went back a few days later to be admitted to the hospital for the performance of tests.

Dr. Tuft reviewed all hospital records. After the October 9th examination, Dr. Tuft's initial impression was toxic exposure. However, he had not seen subsequent evidence supporting that diagnosis, therefore, his "subsequent thought was that it was just severely irritating, something very uncomfortable." (pg. 9)

During Claimant's October 20th examination, he complained of side effects from the medication, nasal congestion and headache. This second visit was for the purpose of completing skin testing that had been started during the first visit. The results of the skin testing was that Claimant had significant reactions to house dust mite and Russian thistle. Dr. Tuft stated that Russian thistle is present in this part of the country and an allergic reaction to it can begin as an adult without any provocation. According to Dr. Tuft, Claimant was suffering from seasonal allergy symptoms which included congestion and watery eyes, when he examined him. Dr. Tuft stated that such symptoms were consistent with someone who had ongoing allergies.

From the results of Claimant's tests, Dr. Tuft treated Claimant for sinus disease. He placed Claimant on medication for acute rhinosinusitis, which is the inflammation of the nasal membrane.. Dr. Tuft explained the results of the methacoline test that was performed on Claimant. According to Dr. Tuft, the drug methacoline induces bronchospasm, and asthmatics have an abnormal response to the it. Claimant had such a response. Apparently, a comment was made by the person who performed the test, that the test was sub-optimal because of Claimant's nausea and apprehension.

Dr. Tuft explained the term industrial, or work related, asthma. This type of asthma is caused by a sensitization that a person is exposed to during work. He explained that work related asthma is different from asthma that is made worse by exposure to irritants, such as dust. The causation of industrial asthma is work related. Dr. Tuft provided an example of this type of asthma.

Dr. Tuft stated that it was possible for Claimant to have an underlying disease of asthma that was triggered by work conditions. However, he testified,

that because Claimant's test results was sub-optimal and no follow up tests had been performed, he could not be completely sure. He proposed that Claimant could have had some unstable airways due to a low grade asthma condition and something irritating would thereafter make Claimant's condition worse. Dr. Tuft testified that follow-up treatment would have helped him to make this determination.

Dr. Tuft testified that his opinion as of November 18, 1997 would not be different today, since he had no new information. In that 1997 report, Dr. Tuft's diagnosis was, "mild allergic rhinitis, possible asthma with chronic sinusitis. It was quite possible that these conditions were exacerbated or irritated by the heavy exposure to toxic or irritating materials as well as possible high levels of dust allergens." (CX 4, p. 18) Dr. Tuft explained he had planned to continue treatment and follow-up Claimant's condition for a possible remedy.

During cross examination, Dr. Tuft was asked to refer to the documentation regarding the methacoline challenge, or bronchoprovocation test.[13] He explained the correlation between Claimant's wheezing and the dosage administered. Apparently, Claimant wheezed and then the test was stopped. During Dr. Tuft's physical examination of Claimant, he never noticed wheezing. Dr. Tuft admitted that wheezing is the "hallmark" of asthma or an asthmatic condition, but he qualified it by stating that statement is sometimes true when the case is "fairly severe." Typically, for the methacoline challenge to be considered positive, the FEV 1 must fall below 20%, the standard. FEV 1 is the forced expiratory volume in one second. Claimant, however, never got below 20%.

According to Dr. Tuft, the fact that Claimant was apprehensive and nauseated during the methacoline challenge would not impact the results of the test because the technicians are careful to ensure constant effort from the patient. And, according to Dr. Tuft, the FEV 1 is not really effort-dependent. In addition, Dr. Tuft explained that because Claimant developed this apprehension and nausea, the test was discontinued. Dr. Tuft analyzed the tests himself to interpret the results. Dr. Tuft further explained the mechanics of the test, including the dosages needed for a reaction. He believed that if Claimant had been given 25 milligrams, he would have reached 20%.

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[13]Employer referred to Claimant's Exhibit 4, page 14.

Dr. Tuft had previously seen the discharge summary from St. Mary's Hospital. He testified that the various tests performed on Claimant had findings of normal. Dr. Tuft stated that he had no reason to criticize Dr. Sukhavasi's return to work slip which allowed Claimant to return to work on October 21, 1996. Dr. Tuft stated that Claimant is a smoker of a half pack of cigarettes for the last 11 years. According to Dr. Tuft, it is not expected that a half pack cigarette smoker would have a decreased flow rate in his lungs.

The methacoline challenge had a nonspecific finding, meaning that taken alone, it cannot be connected to anything. There were possible causes for the decreased flow rate. Dr. Tuft admitted that the decreased flow rate could be caused by smoking, but he qualified his statement by saying "reactive airway disease is not a feature of smoking induced lung disease, per se." (p. 31) Dr. Tuft stated that the decreased flow rate could also be related to the allergic reaction to house dust mites and Russian thistle. He would not rule out that Claimant's condition was caused by dust allergies. Dr. Tuft saw no evidence of a permanent chemically- induced condition.

After studying all of Claimant's medical records, Dr. Tuft found no evidence of chronic wheezing or verifiable medical support for a claim of shortness of breath. According to Dr. Tuft, shortness of breath can have multiple causes. Claimant does not have classic reactive airway disease findings. Based on Dr. Tuft's two examinations of Claimant, he stated that he did not see a permanent presence of any toxin-induced breathing dysfunction. He opined Claimant simply had sinus disease.

Claimant's Exhibit 13 is the deposition of Dr. Curtis Edwin Wills, taken post hearing on August 9, 2000. Dr. Wills is a board certified psychologist and practices such in Texas. (CX 6) Dr. Wills described his educational background and work experience. Dr. Wills had been accepted as an expert in the field of psychology in both State and Federal Court.[14] Dr. Wills was employed by Claimant's attorney to complete a psychological evaluation of Claimant.

Claimant came to Dr. Wills' office for the evaluation on June 11 and 12,

[14]Since Dr. Wills practices in Texas, the Court assumes that his qualifications refer to the state of Texas.

2000, which included psychological tests and an interview. Dr Wills then reviewed Claimant's medical records and wrote his report. The two psychological tests performed were personality tests, which described the individual's psychological functioning regarding various personality issues. When Claimant arrived at Dr. Wills' office, he briefly met with Dr. Wills for a cursory introduction, then Dr. Wills' staff provided Claimant with the tests to complete. The tests are non timed and completed in a quiet area of the office. Once completed, the tests are fed into the computer, which generates a report. Dr. Wills reviewed the report and met with Claimant later that day and the following day.

The computer- generated results of the tests offered a particular psychological profile.[15] According to Dr. Wills, Claimant spent about 6 hours on the tests, with the average time being two to three hours. Dr. Wills was satisfied that the computer generated profile was a correct profile of Claimant based on the answers he gave on the test. The test itself required that a certain amount be completed before a legitimate profile can be generated. Apparently, Claimant did not answer enough questions for the computer to generate a report. Dr. Wills testified that the computer could not generate a report, because Claimant failed to answer enough questions to be analyzed. He, therefore, relied on the interview with Claimant. Dr. Wills testified that absent the computer generated report, he still believed he could render a valid assessment of Claimant. According to Dr. Wills, the entire evaluation rested upon the interview process and review of Claimant's medical records.

Claimant was interviewed the same day he took the tests, and the following morning. Dr. Wills personally met with Claimant during those two days. Dr. Wills explained the process of the personal interview. He obtained a work history and personal history, discussed the events which resulted in the injury, and formed conclusions. After the interview, Dr. Wills came to the conclusion that Claimant was unable to return to work because of the events that occurred during work. "Psychologically, Claimant is encapsulated in a post traumatic stress disorder." (pg. 16) Dr. Wills explained that post traumatic stress is a reaction individuals experience as a result of stressful events in their lives. In Claimant's particular case, the work events devastated Claimant's mental health. Dr. Wills wanted to

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[15] Certain questions on this test were specifically directed at somatic symptoms. The subpart of the test called "Lachar-Wrobel critical term" contained these questions.

refer Claimant to a psychiatrist to deal with Claimant's emotional responses.

Dr. Wills attended the trial and listened to Claimant's direct testimony.[16] Listening to Claimant's testimony did not change Dr. Wills' opinion. In fact, Dr. Wills stated that his opinion was verified and solidified through Claimant's testimony, because of the way Claimant described the event and his resulting symptoms. Dr. Wills stated that each person has a different psychological makeup, and an unique reaction to stressful events. A person with greater education can deal more intellectually with stressful events.

Dr. Wills opined after his interview with Claimant that Claimant suffered from post traumatic stress syndrome. According to Dr. Wills, Claimant's general demeanor noticeably changed when discussing stressful events. During this discussion, Claimant began to breath deep and spit up. Dr. Wills stated that Claimant's emotional reaction in his office was similar to the reaction Claimant exhibited during the trial.

Dr. Wills reviewed Dr. Perez's report and disagreed with Dr. Perez's conclusions. Dr. Wills disagreed with Dr. Perez based upon the tests he himself administered to Claimant. The tests Claimant took for Dr. Wills were true/false tests. Claimant could not answer those questions. Dr. Wills believed that Claimant was incapacitated by some emotional trauma, such as post traumatic depression and a feeling of worthlessness. According to Dr. Wills, Claimant's ability to work had been affected because of his psychological mind-set. Dr. Wills guessed that perhaps Claimant reacted like he did when he met Dr. Perez, by lying on the floor and spitting up, because of an exposure to fumes. However, he does not have enough information from the report to be conclusive. Dr. Wills had no evidence that Claimant was malingering. In fact, Dr. Wills stated that Claimant's parameters of wanting to work and looking for work are inconsistent with a malingerer.

To treat Claimant, Dr. Wills would refer Claimant for psychiatric evaluation. Once Claimant is provided with the proper medication, Dr. Wills believed a large part of Claimant's emotional responses could be controlled. Dr. Wills recommended a psychiatrist, not psychologist, because he felt Claimant was not

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[16]However, Dr. Wills was not present for the cross examination and was therefore not present to see Claimant's reaction to those questions.

ready for psychotherapy. According to Dr. Wills, a psychiatrist would be better equipped to handle Claimant's emotional problems.

As regards Dr. Tuft's examination, Dr. Wills was asked to assume that Dr. Tuft had told Claimant he was shell shocked or bomb shocked. Dr. Wills stated that those two terms are diagnoses of post traumatic stress disorder. Apparently, post traumatic stress is the "new term" for shell shock.

Dr. Wills stated that Claimant's condition of post traumatic stress disorder would certainly affect his search for work. He believed that once an employer was aware of Claimant's psychological disorder, the employer would not hire him. If, however, Claimant was able to find work and was hired, then other problems would arise. With regards to work similar to the type of work Claimant performed, Dr. Wills believed Claimant would not even be able to get out of his car because of fear and phobia. "The pessimistic manifestation of depression is going to be catastrophic." (pg. 27) If Claimant is able to obtain psychiatric intervention, Dr. Wills has some expectation that Claimant's condition would improve. Dr. Wills recommends that Claimant not return to work as a shipfitter because of the psychological reaction of recalling the event which injured him. Dr. Wills stated that if he had knowledge that Claimant had returned to work as a shipfitter after the accident, his opinion would change.

Dr. Wills never reviewed Claimant's statements to Ron Thweatt on October 10 and 18, 1996. During cross examination, he was asked to review them.[17] Dr. Wills stated that Claimant's description of events was consistent with what he had heard regarding the incident. Dr. Wills was next asked to read the narrative discussing Claimant tasting fumes and the resulting symptoms. Dr. Wills called that narrative the traumatic event in this case. Dr. Wills understood that Claimant did not seek medical attention on the day of the accident, but rather he completed his shift. Dr. Wills testified that he was unfamiliar with "metal fume fever."

Dr. Wills learned through Claimant's trial testimony that he had returned to work as a shipfitter for a different employer, Trinity Marine. Employer asked Dr. Wills to assume that Claimant hired on with Trinity Marine in March 1997, and

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[17]Employer was referring to Claimant's Exhibit 13, page 79, which is identified by a tab titled "Exhibit 1".

worked 60 to 90 hours a week as a shipfitter. The working conditions Claimant faced at Trinity Marine were similar to the conditions at Texas Drydock. Dr. Wills was asked to look at Employer's Exhibit 25, page 17, the records from Trinity Marine which stated that Claimant was fired because of violating a substance abuse policy. Dr. Wills stated that he had no independent reason to disbelieve Trinity's records. Dr. Wills admitted that he would have to question his diagnosis of post traumatic stress syndrome if it was true that "Claimant returned to work as a shipfitter for a number of months and if he was fired for violating the substance abuse program." (pg. 54)

Dr. Wills explained the procedure to diagnose post traumatic stress disorder. For a diagnosis, there must first be a traumatic stressor involving actual or threatened death or serious injury. The incident must be extreme life-threatening. The diagnosis of adjustment disorder is indicated when the symptom pattern is not quite enough to trigger post traumatic stress disorder, such as a spouse leaving an individual. Post traumatic stress disorder has been connected to rape, prisoner of war, and airplane crashes. The person's response to the event involves intense fear, helplessness and horror.

Symptoms characteristic of post traumatic stress disorder include persistent re-experiencing of the traumatic event. Dr. Wills was unable to point to any history in Claimant's medical records or statements made to Mr. Thweatt involving persistent re-experiencing of the traumatic event Claimant experienced.[18] Dr. Wills admitted that nothing in Claimant's record indicates that he has persistent, recurring events during his sleep, or nightmares.

Another "hallmark" of post traumatic stress syndrome is a persistent avoidance of stimuli associated with the trauma. Dr. Wills's response to the question regarding an explanation as to why Claimant had consistent employment as a shipfitter at Trinity Marine, until he was fired, was that he was unaware of the similar circumstances that caused the problem at Texas Drydock. Dr. Wills stated that Claimant had explained he avoided heights and things that triggered his symptoms. Claimant applied for work with Trinity Marine and he represented to Trinity that he could perform tack welding and that he could be around grinders,

[18]Dr. Wills was not familiar with Dr. Tuft's report or deposition. He based his answer on the medical reports he had in fact reviewed.

burning equipment and forklifts. In response to the question that Claimant's representations to Trinity were contrary to post traumatic stress syndrome and persistent avoidance of events, Dr. Wills stated that Claimant was merely controlling where he went on the work site. "He was working but controlling where he goes and not having those heights." (pg. 64)

Dr. Wills never read Ms. Hebert's vocational report. He was unaware that Claimant's request for social security disability benefits had been rejected or that in that claim he asserted he could not work because of worsening vision. Dr. Wills was also unaware that the social security disability examiners had found Claimant had normal vision.

Dr. Wills admitted that malingering is a recognized psychological condition, found in the Diagnostic and Statistic Manual of Mental Disorders.[19] According to counsel, this manual stated that "malingering should be strongly suspected if any combination of the following is noted. One is medicolegal context of presentation." (pg. 66) In other words, a situation whereby an attorney refers someone to a clinic for an examination, such as the case with Claimant. For malingering to be suspected, one of the following three combinations must be present: marked discrepancy between the person's claimed stress and objective findings; lack of cooperation during diagnostic evaluation and in complying with the prescribed regimen; and presence of anti-social personality disorder.

As regards the marked discrepancy between the person's claimed stress and objective findings, Dr. Wills stated that he had no knowledge of Dr. Holland's report which stated that Claimant complained of shortness of breath but the pulmonary functions test came back normal. The manual explained that "intense psychological distress or physiological reactivity often occurs when the person is exposed to triggering events that resemble or symbolize an aspect of the traumatic event." (pg. 68) This "new event" must resemble and remind Claimant of the "traumatic event." Dr. Wills agreed that Claimant returning to work as a shipfitter could resemble Claimant's traumatic event.

Dr. Wills admitted that he diagnosed Claimant with post traumatic stress syndrome even though no medical records indicated recurring nightmares. The

[19]This manual was not offered into evidence.

Diagnostic and Statistic Manual of Mental Disorders requires that before a diagnosis of post traumatic stress disorder is made, the traumatic event must be persistently re-experienced. Dr. Wills explained that such re-experiencing is sufficient if it occurs in Claimant's mind rather than being physically re-experienced.

Claimant was examined by doctors without referral from his attorney. They included Drs. Sukhavasi, Tuft, Holland, and the people from St. Mary's Hospital. None of those people noted on Claimant's medical record, that Claimant experienced recurring nightmares, or recurrence of the events distressing to Claimant. Dr. Wills stated that the effects of post traumatic stress disorder occur when the anxiety manifests itself, not necessarily immediately following the event. He explained that there was no timetable.

Employer's Exhibit 1 is the medical report of Dr. Perez. Dr. Perez is board certified in pain management, forensic examination, professional psychology and clinical neuropsychology. (EX 2). Dr. Perez performed a psychological evaluation of Claimant on June 13, 2000 at the request of Employer. Apparently, Claimant was very dramatic during his presentation in Dr. Perez's office. When Dr. Perez met Claimant, Claimant was lying down in front of his office door, spitting up and engaging in strange behavior.

During the interview, Claimant cried. Claimant explained that he had been injured while working for TDI. Claimant stated he has received neither treatment nor medication. According to Dr. Perez, Claimant's behavior was "clearly out of proportion and grossly exaggerated. In my years of clinical practice, I have not seen anybody who truly has anxiety disorder that presents this way." (EX 1,pg. 3) Dr. Perez never saw Claimant hyperventilate. He noted some inconsistencies in Claimant's story. For example, Claimant stated that he stayed indoors constantly, but Dr. Perez noticed that Claimant was tan. Claimant denied marijuana use, but he did tell Dr. Perez, "I did not like it." (pg. 3)

Dr. Perez was unable to complete psychological testing because of Claimant's behavior. According to Dr. Perez, Claimant was producing false results. Dr. Perez stated that Claimant was dramatic and that his behavior does not correspond to medical evidence. "It is my opinion that Claimant's behavior is primarily motivated by secondary gain factors. His behavior presentation makes

absolutely no clinical sense. Malingering is very likely." (pg. 3)

Employer's Exhibit 3 is the medical report of Dr. Vanessa A. Holland. Dr. Holland is board certified in internal medicine and is employed as an environmental pulmonary consultant. (EX 4) Dr. Holland examined Claimant for an alleged inhalation exposure on June 14, 2000. Claimant provided Dr. Holland with his occupational history, current and past medical history, social and family history. Dr. Holland performed a complete physical examination on Claimant. She also reviewed Claimant's past hospitalization records and Dr. Tuft's report. "Based on the review of his diagnostic tests, medical examination, and previous medical records, Claimant's multiple subjective symptoms are not related to his alleged exposure from 1996." (EX 3, pg. 5)

Findings of Fact and Law

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). It must be further recognized that all factual doubts must be resolved in favor of Claimant. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir. 1969). Furthermore, it has been consistently held that the Act must be construed liberally in favor of Claimant. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/ accident occurred on September 26, 1996, during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm has been shown to exist, and I accept the parties stipulation. Clearly, the Claimant inhaled something at work that day that caused him acute symptoms. The extent, duration and disabling effects of those symptoms, however, is quite another matter.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

In this instance, Dr. Sukhavasi determined that Claimant reached maximum medical improvement on October 16, 1996 at a 0% whole body impairment rating, and Claimant was returned to work with no restrictions. The only other doctor to speak to MMI was Dr. Wills, who seemed to opine that Claimant was in need of further treatment and could not return to work. However, his opinion was equivocal at best and appeared weakened if not altered when he learned Claimant had in fact subsequently returned to work as a shipfitter in 1997. Consequently, I accept Dr. Sukhavasi's findings that Claimant reached MMI on October 16, 1996, and therefore, any compensation awarded after that date will be permanent in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident. In this instance, I find Claimant has not presented a prima facie case for total disability after October 20, 1996, as he returned to his pre-injury employment and was subsequently employed doing work similar to that he performed at Texas Drydock (TDI).

Claimant was injured while working for TDI on September 26, 1996. While cutting beams in the leg of an offshore drilling rig, Claimant inhaled fumes and became sick. He rushed out of the enclosed space to the top of the deck. After calming down, Claimant continued his shift. He did not seek medical attention until 2 days after this incident.

Claimant went to St. Mary's Hospital and was ultimately admitted to the hospital under the care of Dr. Sukhavasi. Claimant's symptoms included shortness of breath, body pain and intermittent vomiting. All tests performed on Claimant were normal. Dr. Sukhavasi released Claimant to return to regular work duty on October 21, 1996, without restrictions.

Claimant did return to work at TDI on October 21, 1996 and he continued to work at TDI until early November 1996, when he quit. No documentation was offered to show that Claimant was pulled for medical reasons or was fired from TDI because of an inability to perform his job. Claimant received unemployment benefits until he found new employment, during which time he certified he was capable of work and was actively seeking employment.

On March 16, 1997, Claimant began work at Trinity Marine Products (Trinity Marine) as a shipfitter. Claimant testified that the work at Trinity was similar to the work he performed while employed at TDI. Claimant worked 72 to 90 hours a week at Trinity. Claimant was terminated on April 13, 1997 for violation of the substance abuse policy. There was no indication that Claimant would have been fired because of his inability to perform his job due to a medical condition or that he was forced to quit due to medical reasons.

In June 1997, Claimant began working for Texas Industrial Contractors (TIC). He moved up the ranks from box boy, to forklift driver, and finally to bale inspector. He was employed by TIC until December 31, 1997 when he quit. Again, there was no indication that Claimant would have been fired because of his inability to perform his job due to a medical condition or that he was forced to quit due to medical reasons.

Claimant testified that he had not worked anywhere since December 1997. However, Employer's Exhibit 6 shows that Claimant was employed by Texas Industrial Maintenance from January 3, 1998 until February 9, 1998, when he quit.

In sum, Claimant has not show shown that he was unable to return to his former employment. Dr. Sukhavasi released him to return to regular duties on October 21, 1996. Claimant in fact returned to work. Claimant has shown that he worked post injury for 2 weeks at TDI. He was then gainfully employed by numerous employers from March 1996 through February 1998. The evidence offered does not show that Claimant was terminated or about to be terminated because of his health and inability to perform his job efficiently. Claimant himself testified that while he was employed at Trinity, he engaged in work similar to the work performed for TDI.

The medical reports of Drs. Tuft, Wills, Perez, and Holland support Dr. Sukhavasi's opinion as well as my finding that Claimant has offered no proof of total disability (except for his two week recovery period post accident). Dr. Tuft, certified by the American Board of Allergy and Immunology, examined and treated Claimant on October 9 and 20, 1997. His initial impression of Claimant's condition was toxic exposure. However, he did not see subsequent evidence supporting that diagnosis. Dr. Tuft's final diagnosis was that of "mild allergic rhinitis and possible asthma with chronic sinusitis." He treated Claimant with medication for his sinuses.

Dr. Tuft testified that he had no reason to criticize Dr. Sukhavasi's return to work slip which returned Claimant to regular duty on October 21, 1996. Dr. Tuft stated that he did not see a permanent presence of any toxin-induced breathing dysfunction.

Dr. Perez, board certified in pain management, forensic examination, professional psychology and clinical neuropsychology, examined Claimant on June 13, 2000, at the request of Employer. His opinion was that "Claimant's behavior is primarily motivated by secondary gain factors. His behavior presentation makes absolutely no clinical sense. Malingering is very likely."

The last doctor to examine Claimant was Dr. Holland, on June 14, 2000. Dr. Holland is board certified in internal medicine. Her diagnosis of Claimant was that his "multiple subjective symptoms were not related to his alleged exposure from 1996."

The lone voice in support of Claimant's disability is Dr. Wills, a board certified psychologist, employed by Claimant's counsel, who examined Claimant on June 11 and 12, 2000. His diagnosis was post traumatic stress disorder. However, Dr. Wills said that his opinion would change if he was aware that Claimant had returned to work as a shipfitter after the 1996 accident. He was made aware of that fact during his deposition and his opinion did appear to change. Because Dr. Wills' diagnosis was based on an incomplete history, I reject his opinion in lieu of the other physicians in this claim.

In sum, except for his initial period of recovery, as Claimant has failed to make a prima facie case for total disability, he has not established ongoing disability under the Act. The only compensation I find Claimant entitled to is for the period previously paid by Employer: September 26, 1996 through October 20, 1996. From October 21, 1996 forward, I find Claimant suffered no economic disability except by his own choosing.

Average Weekly Wage

Claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. § 910(a)-(c). Section 10(a) applies when claimant has worked in the same or

comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. Where claimant's employment is regular and continuous, but he has not been employed in that employment for substantially the whole of the year, the wages of similarly situated employees who have worked substantially the whole of the year may be used to calculate average weekly wage pursuant to Section 10(b). Section 10(c) provides a general method for determining annual earning capacity where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's average weekly wage at the time of the injury. *Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1991).

In this instance, Section 10(a) is not applicable because Claimant has not worked for Employer for substantially the whole of the year prior to his injury. I find it unjust to Employer to use Section 10(b), given Claimant's prior work record and the brief time for which he was employed by Employer. Consequently, Section 10(c) offers the most fair approach.

In the 52 weeks prior to his accident, Claimant earned $20,200.04. He earned $775.98 from R.N. Pyle Contractors Inc.; $686.28 from Newtron Mechanical; $1, 943.02 from C.A. Turner Construction Co.; $8,880.38 from CBH Services Inc.; and $7, 914.38 from Employer, Texas Dry Dock, Inc. Dividing Claimant's income in the 52 weeks prior to his accident by 52 yields an average weekly wage of $388.46. It is that figure I shall use.

Medical Expenses

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The

employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'd* 12 BRBS 65 (1980).

The unpaid medical expenses include the ongoing prescriptions recommended by Dr. Tuft and the visit to Dr. Wills. Claimant has failed to establish that Dr. Tuft's prescriptions are related to the injury of September 1996. After Dr. Tuft examined Claimant, he opined that Claimant simply had sinus disease unrelated to any toxin-induced breathing dysfunction. Claimant has not established a prima facie case for compensable medical treatment because Dr. Tuft has not indicated that such treatment, in the form of medications, is a result of a work related condition. Therefore, I find that Employer is not liable for such medication expenses.

Claimant has failed to establish that Dr. Wills' medical expenses were related to the injury of September 1996. Dr. Wills was employed by Claimant's attorney to complete a psychological evaluation of Claimant. There is no evidence to show that Employer ever approved Dr. Wills' examination. After an examination of Claimant, Dr. Wills opined Claimant suffered from post traumatic stress disorder due to work related conditions. He recommended Claimant not return to work as a shipfitter. As a result of this diagnosis, he recommended that Claimant be sent to a psychiatrist to deal with his emotional problems. However, Dr. Wills' diagnosis was based upon an incomplete history. He admitted that his diagnosis of Claimant would change if he knew that Claimant returned to work as a shipfitter for a number of months. Simply put, I find that Claimant has not established a prima facie case for compensable medical treatment from Dr. Wills because, as previously discussed, I do not accept Dr. Wills' opinion that the treatment he provided Claimant, if any, was necessary for his work related accident of September 26, 1996. Employer is not liable for Dr. Wills' charges.

Section 14 (e) Penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation at the incorrect rate, and stipulated that a notice of controversion

was not filed until February 5, 1997, clearly more than 14 days after Employer's September 26, 1996 notification of the accident. Therefore, Claimant is owed 14(e) penalties, the exact amount to be calculated by the District Director.

ORDER

It is hereby **ORDERED** that:

1. Employer/Carrier shall pay Claimant temporary total disability compensation based on an average weekly wage of $388.46 from September 26, 1996 through October 20, 1996;

2. Employer shall receive a credit for all benefits previously paid to Claimant;

3. Pursuant to Section 14(e) of the Act, Employer shall be assessed penalties on all compensation not timely paid, the exact amount to be calculated by the District Director as heretofore set out;

4. Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

5. Pursuant to Section 7 of the Act, Employer/Carrier is not responsible for the prescriptions of Dr. Tuft or Dr. Wills' charges, nor is Employer/Carrier responsible for any additional medical expenses Claimant might incur, in as much as Claimant has recovered from his accident of September 26, 1996;

6. Counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. *See* 20 C.F.R. § 702.132.

7. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 15th day of November, 2000 at Metairie, Louisiana.

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C. RICHARD AVERY
Administrative Law Judge

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